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NTSB Order No. EA-4191

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 3rd day of June, 1994

DAVID R. HINSON, Administrator, Federal Aviation "Administration, Complainant, v. FRED SORENSON, Respondent.	Docket SE-13332

OPINION AND ORDER

The Administrator and the respondent have both appealed from the written initial decision Administrative Law Judge William A. Pope, II issued in this proceeding on February 14, 1994, following a five-day evidentiary hearing on an order of the Administrator which revoked, on an emergency basis,[1] respondent's

[1]Although the respondent waived expedited processing of his case by the Board, he filed, on April 25, 1994, a motion requesting expedited consideration of his appeal from the law (continued. ..)

Airline Transport Pilot Certificate (No. 586391) and his Airframe and Powerplant Certificate (No. 1253445) with Inspection Authorization.[2] The law judge, based on a thorough and comprehensive review of the evidence of record, concluded that while respondent had committed some of the alleged regulatory violations, he had not been shown to lack qualification to hold his certificates. The law judge therefore modified the Administrator's order to provide for an eight-month suspension instead of revocation. For the reasons discussed below, we will deny the Administrator's appeal for the reinstatement of revocation and grant the respondent's appeal to the extent it seeks a further reduction in sanction.

The charges in this proceeding stem from respondent's efforts to assist an Oklahoma organization named "Third World Hope Inc." (TWH) by preparing a de Havilland DHC-4A aircraft (commonly known as a "Caribou") , for a trip to Malawi, Africa, where it was to be used to distribute food in connection with

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[1] . (..continued)
judge's decision on the emergency order. A motion for such relief is unnecessary, as it is the Board's policy to turn to waived emergencies as soon as they are fully briefed. In this case, for example, the parties filed their reply briefs on April 14.

[2] A copy of the initial decision is attached.

[3] The Administrator's appeal will be granted to the extent it seeks reversal of the law judge's dismissal of the charge that respondent violated section 91.203(c) of the Federal Aviation Regulations (FAR, 14 CFR Part 91).

hunger relief activities.[4] Respondent, who apparently had volunteered his pilot and mechanic services to TWH, had been engaged to fly the aircraft from Pensacola, Florida, to Malawi after outfitting it with the temporary, supplementary fuel and oil systems it would need to make the long distance flight. Installing such systems required FAA permission and review, as the work entailed major alterations whose components would raise the aircraft's weight above its certificated takeoff maximum. Respondent applied to the Birmingham, Alabama Flight Standards District Office ("FSDO") for the necessary authorizations.

Just prior to departing for Africa (via Bangor, Maine) , respondent and others involved in the venture flew the aircraft to a repair station at Teterboro, New Jersey for, according to respondent, a maintenance check on the main landing gear, which seemed to have an intermittent problem related to uncommanded deployment. Soon after landing, the aircraft was subjected to a ramp inspection by FAA inspectors from FSDO at the Teterboro airport. Their report led to the charges in this case that, among other things, challenge the adequacy of certain-maintenance respondent had performed on the aircraft, including the installation of the additional fuel-oil system and the associated entries in maintenance records, the truthfulness of representations made in various documents with respect to the

[4]The law judge's decision fully sets forth the allegations in the Administrator's October 4, 1993 Emergency Order of Revocation and those added in amendments issued on December 23, 1993, and January 7, 1994.

alterations, and the operation of the aircraft with conditions the inspectors believed rendered it unairworthy.

The Administrator's Appeal.

The Administrator's appeal primarily involves the law judge's determination that respondent had not been shown to have made, within the meaning of FAR section 43.12(a) (1),[5] any intentionally false or fraudulent statements in maintenance records concerning the aircraft's alterations. We find no merit in the Administrator's various contentions that the law judge erred in this regard, for the Administrator's insistence that the law judge's decision is contrary to the preponderance of the evidence of record wholly ignores the credibility assessments on which the law judge based his rulings.[6] Although the law judge has fully explained his reasons for concluding that respondent did not intend to falsify the documents questioned by the Administrator, we think a brief discussion of the several alleged falsifications is warranted.

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[5]Section 43.12(a) (1) provides as follows:

§ 43.12 Maintenance records: . Falsification, reproduction, or alteration.

(a) No person may make or cause to be made:
(1) Any fraudulent or intentionally false entry in any record or report that is required to be made, kept, or used to show compliance with any requirement under this part . . . .

[6]That the law judge, in explaining certain credibility assessments, questioned whether respondent had anything to gain by the alleged falsifications does not mean that he rejected the charges because no motive had been established, as the Administrator argues.

1. Application for Special Airworthiness Certificate and FAA Form 337. In order legally to operate the Caribou with a fuel-oil system not originally installed by the manufacturer, respondent, on behalf of TWH, needed FAA approval for the temporary alteration. Generally speaking, this is accomplished by submitting to a FSDO an FAA Form 337 describing in detail the changes to be made to the aircraft. If the changes have previously been accepted by the FAA when proposed by others (in an earlier FAA Form 337 or in a supplemental type certificate for the aircraft) or developed by the manufacturer, an FAA Form 337 approving the alteration will routinely be issued. If they have not been, then an FAA inspector with appropriate authority must review the installation and either accept (a field approval) or reject it.

Respondent did not have any previously approved data for the auxiliary system he wanted to have okayed, and because the set-up would increase the aircraft's gross takeoff weight by almost 10 percent, respondent needed, in addition to an approved Form 337, a special airworthiness certificate (ferry flight permit) . Although respondent denied it, the FAA inspector at the Birmingham, Alabama FSDO, Mr. Elliott, testified that he consulted by telephone about the issuance of these documents, and respondent had told him that there was manufacturer's approved data for the alteration. In any event, when the inspector later received for his review the special airworthiness certificate application along with the Form 337 that contained an extensive

description and explanation of the alteration, he approved the application without either inspecting the aircraft itself or examining the Form 337 closely enough to recognize that it did not indicate that there was approved data of any kind for the installation.[7]

The Administrator's first intentional falsification allegation is predicated on respondent's certification, on the special airworthiness certificate application, to the effect that he had inspected the aircraft and found it airworthy for the flight to Africa, and on his return to service signoff on the accompanying Form 337. These were false, in the Administrator's view, because respondent could not validly so certify unless and until the FAA had approved the data for the alteration itself, which, of course, had not yet been done.[8] The law judge concluded that respondent had not intended by his premature certifications to mislead the FAA inspector as to the existence of approved data for the alteration, but was, rather, simply attempting to speed up the process.[9] We see no ground in the

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[7]The description of the system respondent attached to the form did, accurately, indicate that certain fuel control valves, oil line and tank fittings used in the installation were factory installed.

[8]FAR section 65.95 authorizes an inspection authorization holder to return an aircraft to service after a major alteration "if the work was done in accordance with the technical data approved by the Administrator. . . ."

[9]In other words, if field approval for the alteration was given based on the data supplied by the respondent with the Form 337, the special flight permit could be issued without awaiting respondent's certification that he had installed the alteration

(continued. . .)

Administrator's appeal for overturning that conclusion, based, as it is, so heavily on a favorable assessment of respondent's credibility. At the same time, we are constrained to register our view that the justification for prosecuting this charge is difficult, at best, to discern.

Notwithstanding the respondent's anticipatory, arguably presumptuous, certifications, it was clear from the paperwork supplied with the application that there was no approved data for the alteration, and no reason appears for any belief on respondent's part either that this fact would not be immediately evident to Inspector Elliott, who, in the proper discharge of his responsibilities, could be expected to read the documents respondent had sent him for approval, or that Inspector Elliott would construe the airworthiness signoff on the application, or the return to service signoff on the form, to mean that the data the FAA was being asked to approve on the attached Form 337 had already been approved. Indeed, in these circumstances, we do not see how this falsification charge could be established without some persuasive showing the respondent knew or should have known before submitting the paperwork to Inspector Elliott that he would not process it properly, a scenario neither supported by the record nor advanced by argument of Administrator's counsel.

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[9] (continued)
in accordance with that data. The record contains evidentiary support for the respondent’s contention, accepted by the law judge, that the procedure followed by the respondent was not an uncommon industry practice.

2. FAA Form 337. The Administrator next argues that respondent intentionally falsified the Form 337 given to Inspector Elliott because the description of the alteration it contains shows only one oil drum, even though the aircraft, when ramp inspected at Teterboro, had two oil drums. The law judge accepted the testimony of respondent and one of his witnesses that while a second oil drum had in fact been placed (and secured) in the aircraft, it was not an operational part of the fuel-oil system, as the Administrator's witnesses believed, but, rather, had been positioned, at least originally, so as to serve as a platform for pumps that were connected to the system.[10] While reasonable minds might reach different conclusions on whether the drum should have been included in the drawings of the system, the falsification charge based on the allegedly incomplete description seems strained at best, for, like the obvious lack of approved data for the alteration in the documents tendered for approval, the second drum was there in the aircraft. for the FAA to see. We perceive no justification for the Administrator's apparent belief that respondent would somehow have known, before submitting the relevant paperwork to Inspector Elliott, that a required inspection of the aircraft would be not conducted, and thus the presence of the second drum would not have been detected. Respondent plainly could not have such knowledge beforehand, anymore than he would have had the prescience to know

[10]The law judge also found that respondent had, contrary to the Administrator's allegation, included the weight of the second drum in his weight and balance calculations.

that the inspector would fail to show up at the time he and respondent had scheduled for him to inspect the actual. installation, at which time any question about the necessity to include the second drum in the description of the system could have been resolved.[11]

In other words, once again, as with the first falsification charge, the relevant proof of respondent's intent seems to depend upon information he either did not have or could not have had; namely, foreknowledge that the inspector would not do his job properly.

3. Major Alteration logbook record. While it appears that the law judge may have overlooked the Administrator's charge that respondent intentionally falsified a logbook entry concerning the fuel-oil system he installed, we agree with the respondent that no falsification with respect to the form was established. In this connection, the Administrator argues in effect that a logbook page submitted to the Teterboro inspectors several weeks after the ramp inspection constitutes an intentionally false record, not because the information on it is not true, but because of the Administrator's belief that the respondent's failure to produce the record earlier proves that it must have been created after the ramp inspection.

[11]Instead of keeping the appointment, Inspector Elliott signed off on the Special Airworthiness Certificate and left it and the FAA Form 337, which he did not complete, with the Fixed Base Operator at Pensacola for respondent to pick up.

We find it unnecessary to attempt to determine whether the inspectors overlooked the page when they first reviewed the aircraft's records," as respondent maintains, or whether respondent created it after-the-fact. The document itself contains no representations as to when the entries on it were in fact made or entered in the logbook, and there is no real dispute as to the accuracy of the information itself.[12] It therefore makes no difference, for purposes of FAR section 43.12, when the record was created.[13]

* * * * *

The Administrator also argues that the law judge erred by not finding a violation of FAR section 91.203(c) . This charge is predicated on respondent's operation of the aircraft, prior to the ramp inspection at Teterboro, with the unapproved, auxiliary fuel system aboard.[14] In this connection we note that the law

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[12] The logbook page, among other things, purports to reflect respondent's signoff and approval of the aircraft for a ferry flight with the temporary fuel-oil system installed. See Adm. Exh. 21, sheet 8.

[13] The Administrator's reliance on Administrator v. Rice, 5 NTSB 2285 (1987), is misplaced. The issue in that case was not the propriety of post-creating a maintenance record, but of post-dating one.

[14] FAR section 91.203(c) provides as follows:

§ 91.203 Civil Aircraft: Certifications required.

(c) No person may operate an aircraft with a fuel tank installed within the passenger compartment or a baggage compartment unless the installation was accomplished pursuant to part 43 of the chapter, and a copy of FAA Form 337 authorizing that installation is on board the aircraft.

judge believed that respondent, contrary to his testimony, was aware that the FAA approval block on the Form 337 returned to him by Inspector Elliott had not been filled in, and that respondent should have ascertained from the inspector the actual reason for what appeared to be a matter of oversight. Nevertheless, the law judge concluded that no violation should be found because the fuel system, despite the objections to it voiced by the FSDO in New Jersey, was subsequently approved without change by the FAA FDSO in Oklahoma City, albeit with additional description on a resubmitted Form 337. We agree with the Administrator that the charge was established, although its impact on sanction should be minimal in the circumstances. We do not concur in respondent's contention that the ferry permit issued for overweight operation covered the extended range fuel system alteration as well.

The Respondent's Appeal.

The respondent's main argument on appeal is that the law judge erred by not dismissing as stale, under Section 821.33 of our rules of practice, the remainder of the charges in the complaint after determining that the falsification charges had not been proved.[15] We find no error in the law judge's decision

[15] Section 821.33 provides, in pertinent part:

§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:

(continued. . .)

not to dismiss those charges, which the Administrator concedes were not prosecuted within six months of their discovery. Respondent's position that they should have been dismissed is based on the mistaken assessment that the complaint, without the falsification charges, could not be read to present an issue of lack of qualification and, therefore, could not survive a motion to dismiss for staleness. While we believe this question should have been resolved at the outset of the hearing, we think the law judge, citing Administrator v. Potanko, NTSB Order EA-3937 (1993), in effect determined, correctly, that while the complaint clearly presented an issue of lack of qualification with the falsification charges, it arguably presented such an issue

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[15] (...continued)

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

* * *

(b) In those cases where the complaint alleges lack of qualification of the certificate holder:

(1) The law judge shall first determine whether an issue of lack of qualification would be presented if any or all of the allegations, stale and timely, are assumed to be true. If not, the law judge shall proceed as in paragraph (a) of this section.

(2) If the law judge deems that an issue of lack of qualification would be presented by any or all of the allegations, if true, he shall proceed to a hearing on the lack of qualification issue only, and he shall so inform the parties. The respondent shall be put on notice that he is to defend against lack of qualification and not merely against a proposed remedial sanction.

without them.[16] Such a determination effectively removes the stale complaint rule from further consideration in a case, since the rule's purpose 'is to avert the litigation of stale allegations that either individually or collectively do not impugn qualifications, not to remedy sluggish prosecution of charges that have been tried in cases in which revocation is ultimately found to be not warranted.

As to the substance of several of the allegations the law judge did sustain relating to respondent's alleged operation of the Caribou with uncorrected mechanical discrepancies, See I.D. at 27-28, and without having made necessary maintenance entries as to other discrepancies that were repaired, Id. at 29, the respondent argues that the Administrator did not meet his evidentiary burden. While we agree with the respondent as to paragraph 8(d) of the complaint, we do not agree as to paragraph 8(f) or paragraph 11. At the same time, we are persuaded that any violation of FAR sections 91.405(a) and 91.407(a) established by the fact that a knurled nut (which is secured by hand-tightening) on the Janitrol heater vibrator was found to be loose is a minor one.

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[16]The Board's acquiescence, in Administrator v. Conahan, NTSB Order EA-4044 (1993), in the parties' agreement that the law judge postpone to the end of the hearing a determination as to whether an issue of lack of qualification had been presented did not constitute an endorsement or approval of such a clear departure from the requirements of our Rule 33, which contemplates that the grant or denial of a stale complaint motion be made on the basis of a threshold legal determination on qualifications, unaffected by evidentiary or factual matters developed during a hearing.

Paragraph 8(d) of the complaint asserts violations of FAR section 91.405(a) and 91.407(a) because four brake bleeder valves on the aircraft's main gear were not safety-tied. Neither side presented any documentary evidence as to whether they needed to be, and we see no reason in the record or in the law judge's disposition of this allegation for giving the inspector's testimony on the issue greater weight than the opinion offered by the respondent. In any event, it was not, as the law judge stated, respondent's obligation to present evidence that safety wiring was not required; rather, it was the Administrator's burden to prove that it was. The allegation respecting this paragraph is dismissed.

With regard to paragraph 11, we share the law judge's view that respondent's failure to make timely or complete maintenance entries as to three repairs made in December 1992 constituted violations of FAR sections 43.ll(a) and 43.13(a) and (b).[17]

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[17]FAR sections 43.ll(a) and 43.13(a) and (b) provide, in pertinent part, as follows:

> § 43.11 Content, form, and disposition of records for inspections conducted under Parts 91 and 125 and §§ 135.411(a) (1) and 135.419 of this chapter.
>
> (a) ***Maintenance record entries.*** The person approving or disapproving for return to service an aircraft, airframe, aircraft engine, propeller, appliance, or component part after any inspection performed in accordance with Part 91, 123, 125, § 135.411(a)(l), or § 135.419 shall make an entry in the maintenance record of that equipment containing [among other things, the following information: the type of inspection and a brief description; the date of the inspection and aircraft total time in service; the signature and the certificate number of the person performing the inspection; a return to service certification if the aircraft is found airworthy; a list of discrepancies if the

(continued. ..)

Those violations are not excusable, in our judgment, because respondent, up until the time he completed and signed off the necessary entries, had been in control of aircraft as its pilot-in-command and its mechanic.

On the question of sanction, the Administrator maintains that revocation should be reinstated despite the law judge's dismissal of many of the allegations in the emergency order, and the respondent contends that even an eight-month suspension for the charges upheld by the law judge is excessive. We find no merit in Administrator's position, but agree with the respondent that the sanction should be reduced below what the law judge imposed. A brief summary of the charges rejected and accepted

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[17] (. ..continued)
aircraft is not found to be airworthy.].

§ 43.13 Performance rules (general) .
(a) Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other techniques, and practices acceptable to the Administrator, except as noted in § 43.16. He shall use the tools, equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industry Practices. If special equipment or test apparatus is recommended by the manufacture involved, he must use that equipment or apparatus or its equivalent acceptable to the Administrator.
(b) Each person maintaining or altering, or performing preventive maintenance, shall do that work in such a manner and use materials of such a quality, that the condition of the aircraft, airframe, aircraft engine, propeller, or appliance worked on will be at least equal to its original or properly altered condition (with regard to aerodynamic function, structural strength, resistance to vibration and deterioration, and other qualities affecting airworthiness) .

will be informative regarding our judgment on just how far it should be reduced.

The law judge "sustained violations of FAR sections 43.ll(a), 43.13(a) and (b), 91.7(a), 91.405(a), 91.407(a), 91.409(f), and 91.13(a) .[18] We have concluded, like the law judge, in most respects, that respondent did not attempt to mislead the FAA in connection with the paperwork he prepared or filed to obtain approvals for operating the aircraft with an auxiliary fuel system, that when he operated the aircraft it had only two or three of the seven discrepancies alleged by the Administrator, and that he did not operate the aircraft when it had an excessive oil leak or when he did not have an approved flight manual on board. On the other hand, we concur in the allegations or findings that respondent operated the aircraft when the supplementary fuel system had not been approved, when it was unairworthy because of a suspected gear problem,[19] when it had two discrepancies that should have been corrected (unsecured Loran and battery, loose heater nut), when an inspection program for the aircraft was technically not in force,[20] and when several

[18]The respondent's brief correctly points out that the law judge's final listing of the charges sustained (I.D. at 32) mistakenly includes an allegation he dismissed; namely, the violation of FAR section 91.9(b) (1) alleged in paragraph 7 of the complaint. See I.D. at 27.

[19]FAR section 91.7(a) prohibits operation of an aircraft that is not in an airworthy condition.

[20]FAR section 91.409(f) prohibits the operation of a large aircraft (not subject to Part 125) that does not have an approved inspection program. Although the Caribou had such a program in

(continued. . .)

required maintenance entries either had not been made or were not complete. [21]

We noted early in this opinion that the charges in this proceeding arose from the respondent's efforts to prepare the Caribou for use in food distribution flights in Africa. It could also be said that most or perhaps all of the violations would never have occurred if the inspector from the Birmingham FDSO had properly handled the Form 337, or had given it to someone more knowledgeable than he, for at that stage of the respondent's undertaking all issues relating to any perceived paperwork or maintenance deficiencies could have been addressed in a nonadversarial context, with the likely result that the aircraft would have received the clearances it finally obtained considerably sooner, to the obvious benefit of those in need of its cargo delivery capacity.[22]

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[20] (. ..continued)
the name of its previous owner, who sold the aircraft to TWH just before respondent in effect became its custodian, the program had not been approved under TWH's name. The name change for the inspection program was approved by the Oklahoma FSDO after the aircraft was flown there from Teterboro. There is no allegation that the aircraft, notwithstanding the necessity for a name change, was not receiving or did not receive in the interim the inspections or maintenance called for by the program.

[21] The enumerated circumstances support, as well, the charge under FAR section 91.13(a) that the respondent operated the aircraft in a careless manner so as to endanger the life or property of another.

[22] We do not believe that it would have been inappropriate for the FAA to have provided such advice and guidance as might have facilitated the mission, rather than pursuing a course that could not help but delay its accomplishment.

While we do not differ with the law judge's assessment that the respondent knew the various requirements of the regulations he was charged with violating, and we agree that the charges cannot be excused on the ground that respondent's lax compliance involved a charitable goal he felt pressured to achieve, we find ourselves persuaded that the humanitarian use planned for the aircraft respondent was readying for the flight to Africa, coupled with the nonpecuniary motivation for his conduct, does constitute an extenuating circumstance justifying some softening of the sanction that might otherwise be appropriate. Consistent with that view, we think a 120-day suspension of respondent's two certificates will sufficiently sanction him for his, to some degree, understandable failure to meet the obligations of regulations he, as a pilot and mechanic, knew or should have known governed even an altruistic exercise of certificate authority.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied in part and granted in part;

2. The respondent's appeal is granted in part and denied in part; and

3. The initial decision and the emergency order are affirmed to the extent they are consistent with this opinion and order and are otherwise reversed, and they are hereby modified to provide for a 120-day suspension of respondent's airman certificates.

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.